



EMPLOYMENT TRIBUNALS

Claimant: Miss A A Olt

Respondent: Asda Stores Limited

Heard at: Bodmin **On:** 20, 21, 22 and 23 March 2023

Before: Employment Judge A Matthews

Members: Ms R Hewitt-Gray
Ms E Smillie

Representation:
Claimant: In Person
Respondent: Miss M Martin of Counsel

UNANIMOUS RESERVED JUDGMENT

1. Miss Olt's claims that she was discriminated against because of the protected characteristic of her race by reference to section 13 (direct discrimination) of the Equality Act 2010, were not presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have no jurisdiction to hear those claims.
2. Miss Olt's claims that the Respondent Company failed to comply with a duty to make reasonable adjustments by reference to sections 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the Equality Act 2021, were not presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have no jurisdiction to hear those claims.
3. Accordingly, Miss Olt's claims of discrimination (as referred to above) are dismissed.

4. Miss Olt's complaint of constructive unfair dismissal by reference to sections 94 and 95 of the Employment Rights Act 1996 was not presented to an employment tribunal before the end of the period specified in section 111 of the Employment Rights Act 1996. The employment tribunals have no jurisdiction to hear that complaint, which is therefore dismissed.

REASONS

INTRODUCTION

1. Miss Andreaa Olt's claims and the issues involved were discussed at two preliminary hearings. Case Management Orders made by Employment Judge Roper on 22 July 2022, sent to the parties on 29 July 2022, can be seen at pages 35-47 of the bundle (all references to pages are to pages in the bundle unless otherwise specified). At a hearing on 17 October 2022, Employment Judge Fowell made further Case Management Orders, sent to the parties on 27 October 2022. Employment Judge Fowell allowed claims of a failure to make reasonable adjustments and constructive unfair dismissal to be added by way of amendment. His orders can be seen at 49-56. The result of these was that the matters to be decided by this Tribunal were as set out below.
2. First, Miss Olt claims that she was discriminated against because of the protected characteristic of her race by reference to section 13 (direct discrimination) of the Equality Act 2010 (the "EA"). The treatment that Miss Olt alleges was less favourable treatment for this purpose, was the Respondent Company's failure to provide Miss Olt with all or any of the following before 31 July 2021:
 - (1) a uniform,
 - (2) a locker,
 - (3) a written contract of employment,
 - (4) access to her payslips (because Miss Olt was unable to access her online account),
 - (5) a code for the employee entrance,
 - (6) a clocking in card and
 - (7) a login password for the computer system.

3. For the section 13 EA claim, Miss Olt relies on two comparators “Jack” and “Joe” or, in the alternative, on a hypothetical comparator.
4. Second, Miss Olt claims that the Company failed to make reasonable adjustments in relation to her disability by reference to sections 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the EA. This is put by reference to a “provision, criterion or practice” (“PCP”) of the Company’s. The PCP relied on is requiring employees to remain in the same department without transferring them. Miss Olt suggests that reasonable adjustments would have been allowing her to change departments and/or change her duties and/or a phased return to work.
5. Miss Olt relied on a mental impairment, being anxiety/depression, as having a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The Company accepted this was a disability for the purposes of section 6 of the EA. The Company also agreed that Miss Olt had been a disabled person at all material times from 21 March 2021 for the purposes of the issues. As far as the Company’s knowledge of the disability is concerned, the Company agreed that it knew of Miss Olt’s disability from 23 March 2021.
6. Third, Miss Olt claims that she was constructively unfairly dismissed. Miss Olt says that any or all the Company’s conduct listed below amounted to a fundamental breach of the implied term of trust and confidence in her employment contract entitling her to resign and treat herself as constructively unfairly dismissed. The alleged conduct relied on is:
 - (1) that listed in paragraph 2 above and/or
 - (2) the Company only making contact once with Miss Olt during her period of sickness absence and/or
 - (3) the Company failing properly to process the grievance complaint which Miss Olt raised in April 2021 and/or
 - (4) the Company failing to make the recommended adjustments referred to in paragraph 4 above.
7. The Company denies any discrimination and says that there was no fundamental breach of contract. Further, even if Miss Olt resigned because of a fundamental breach, she delayed too long before resigning and thereby affirmed the contract. The Company did not argue that, if there was a dismissal, it was fair.

8. Employment Judge Roper's Case Management Orders recorded time points in relation to the race discrimination claims (43). Employment Judge Fowell was not requested to provide written reasons when he allowed Miss Olt to amend her claims to include the claims of a failure to make reasonable adjustments and for constructive unfair dismissal. We do not, therefore, have the benefit of any written reasons. However, we have contacted Employment Judge Fowell and referred to his notes. The notes confirm that he considered time limits in the context of the application to amend but did not decide the issue. Time limit issues in relation to all the claims, therefore, remain to be decided by us.
9. Miss Olt gave evidence supported by a written statement. Miss Olt produced a statement from Mr Jason Earl-Davies. Although Mr Earl-Davies did not take the witness stand, there was no objection to his short statement being taken into evidence. On the Company's side we heard from Mr Jamie Brown (at the relevant times, Foodhall Trading Manager at the Company's Penryn store), Mr Matthew Ramsden (at the relevant times, Section Manager in the Home Shopping department of the Company's Penryn store) and Ms Claire Diment (People Business Partner with the Company). Each produced a written statement.
10. There was a 293 page bundle of documentation. There was also a Cast List, a Chronology of Events and a Reading List. Miss Martin produced comprehensive and helpful written argument.
11. The Hearing was listed for the four days it eventually took. The Hearing was adjourned for the afternoon of 21 March 2023 as Miss Olt was indisposed. The Tribunal reserved judgment.
12. The credibility of witnesses has not been a consuming issue in this case. Miss Olt gave her evidence consistently and was willing to concede some points that were not in her favour. This was also true of Mr Brown, Mr Ramsden and Ms Diment. There are a few areas where the evidence on the two sides differs. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate, the provisions of section 136 EA (Burden of Proof) have been taken into account.
13. It was clear that miscommunication and misunderstanding at the time of the events we are concerned with had played a significant role.

FACTS

14. The Company is well known. At the time of its amended response in these proceedings, it had over 600 stores in the United Kingdom and around 140,000 employees.
15. Miss Olt describes herself as of Romanian national origin.
16. Miss Olt joined the Company on 8 April 2018 as a Temporary Warehouse Operative at the Company's Distribution Centre at Brackmills in Northampton. Miss Olt resigned her employment with the Company with effect from 31 January 2022.
17. From the papers we have seen, Miss Olt was well thought of by her managers at the Northampton Distribution Centre (119-122). All in all, we conclude that Miss Olt had a positive and successful working experience at that Centre. At the heart of these proceedings is that, clearly, that positive experience was not repeated on Miss Olt's transfer to the Company's Penryn store.
18. Miss Olt secured a place at Falmouth University in Cornwall, to read for a degree in Sustainable Tourism Management. (We understand that Miss Olt was awarded a First Class degree in that subject in November 2022.) As a result, Miss Olt needed to move from Northampton down to Falmouth.
19. To obtain a tuition fee loan, Miss Olt needed to provide evidence that she was in work. To satisfy this requirement, Miss Olt applied for a transfer from the Company's Distribution Centre in Northampton to the Company's Falmouth store in Penryn (119-122). Miss Olt successfully completed this process following a remote interview with Mr Brown. Miss Olt started at the Penryn store on 10 October 2020 and reported for (but did not work) her first shift on 12 October 2020.
20. In making the move to Falmouth, Miss Olt had to cope with many changes. There were domestic changes such as finding accommodation and settling into the university course. There were also significant changes in Miss Olt's employment. Miss Olt's hours were changing from basic hours of 32 a week to two shifts on a Thursday and Saturday from 1400-2200, totalling 16 hours a week. Miss Olt was moving from a warehouse working environment to that of a retail store. The nature of Miss Olt's job changed. In the team at Penryn, Miss Olt's job was to store "totes" "picked" by her colleagues in the appropriate areas and in the right order. Having done so, Miss Olt met customers coming in to collect goods and found their totes for them. Having unloaded the totes, Miss Olt then dealt with any returns and refunds and took the totes and "dollies" back to the store for re-

use. Miss Olt also supervised totes going out for distribution to customers by the Company's delivery service. This was very different from her recent role as a supervisor of a packing area. Most significant of all on the work front was that Miss Olt joined the Penryn store as the second wave of the Covid 19 pandemic broke. The Company's witnesses all used the word "chaos" to describe the working environment that Miss Olt moved into. This was particularly so in the department which Miss Olt joined, run by Mr Brown.

21. Mr Brown was the manager responsible for Online Operations in the Home Shopping department. In essence Online Operations processed online orders, including "click and collect". Goods were "picked", packed and despatched. Prior to the second wave of the Covid 19 pandemic, Mr Brown had around 70 people reporting to him. Over 2021 this number more than doubled to around 160 as the demand for online ordering surged. It is clear to us and acknowledged by the Company, that this put a severe strain on staff and what would have been the Company's normal operating processes. An example of this is the way staff were inducted into the department. In the bundle we see the Company's policies covering internal transfers of staff (72-75). At 73 are the inductions policies. Whilst there is some dispute between the parties about what was and was not done, Mr Brown's evidence was that the process had been curtailed (our word) because of the Covid-19 pandemic and the pressures in store coping with the changing pattern of customer demand.
22. One of the steps the Company took to address the pressures in Mr Brown's department was to appoint Mr Ramsden as an additional manager reporting to Mr Brown.
23. At 134-137 is a "punch record" of Miss Olt's attendance at the Penryn store between 12 November 2020 and 25 December 2021. We did not get to the bottom of how this document came into being and will return to that subject below. However, the record shows that Miss Olt worked shifts on 12, 14, 19, and 21 November, 10, 12, 17 and 19 December and 21 January (although Miss Olt's evidence is that she did not, in the event, work on that day). We know that Miss Olt had only worked one shift before 27 October 2020 (see 133. This was probably on 15 October 2020 – see 14). Assuming Miss Olt worked two shifts in each week from 27 October until 12 November 2020, she worked a total of 4 shifts prior to 12 November 2020. This is probably not an exact calculation but that does not matter for this purpose. The point is that Miss Olt worked shifts on a total of something like 12 days at the Penryn store. This was a relatively short period and puts some perspective on events.

24. Mr Brown had actioned Miss Olt's transfer on the Company's systems on 8 October 2020, before Miss Olt reported for her first shift on 12 October. The e-mail chain at 124-126 reflects this and the problems Mr Brown had between 8 and 16 October. The delay seems to have been none of Mr Brown's doing.
25. When Miss Olt reported at the Penryn store on 12 October 2020 (a Monday and not technically one of Miss Olt's shift days), Mr Brown sent her home because there was no work to do. This happened again and, as we have noted, Miss Olt only worked one shift prior to 27 October instead of the four shifts she might have expected.
26. On 24 October 2020 Miss Olt sent Mr Brown a message, which reflected her general disquiet at her reception at the Penryn store as well as the specific issue of a clocking card (127):

"Hello Jamie, this is really an awkward and weird situation and I hope that soon you will decide to meet me and accommodate me properly in my new work place. I guess tomorrow you won't be there to sort my clocking card because mine isn't working."

Mr Brown replied on 26 October to say that he was having to contact HR services to sort out Miss Olt's transfer (that is, obtain a clocking card for her). The following exchange took place (127-128):

Mr Brown: "Hey, really sorry for the delay in the transfer! Having to get hold of hrss as the pay rates are different in stores to distribution so makes it a bit more complicated."

Miss Olt: "I know for sure I'm supposed to have the same pay rate as in the warehouse for the first 6 months after the transfer. But at this point you won't have what to pay me for if I'm not working. We really have to talk because my managers told me the transfer is done and I need some answers for all that is happening. I'll call tomorrow after I speak with the team from Northampton, this is very inconvenient for me if I'm not working and I'm not paid because of the transfer."

Mr Brown: "Yeah that's fine, I'm on a late tomorrow so in from 1pm, I'll ring hrss when I get in and then drop you a message."

27. On 27 October 2020 Miss Olt appealed to her former manager in Northampton to help sort out the transfer problems (133). By that time, Miss Olt had worked one shift, as mentioned above, but had had no induction, no health and safety briefing and only 5 minutes of

training. The matter was passed to Bob Baxter (General Manager – Brackmills Asda Distribution Centre) who replied the same day to apologise for the problems and confirm the issue was being raised centrally (133).

28. Later that day, 27 October, this message exchange took place (129):

Mr Brown: *“Hey, didn’t want to ring due to the late hour as have only just heard back! Everything should be resolved really quickly now. I’m off tomorrow but back in Thursday so did you want to come in for your proper induction on Thursday and we can go through everything then sort it all out?”*

Miss Olt: *“Yes, sounds good.”*

29. On 28 October 2020 Miss Olt had an induction with a manager, Chloe. This included some training on scanning the totes. Miss Olt was “buddied up” with a colleague and given practical training on what to do. This was not, however, the comprehensive induction Miss Olt had expected. Mr Brown’s evidence was that this was normal practice at the time (WS 5 - see also Ramsden WS 5).

30. On 7 November 2020 Miss Olt realised she hadn’t been paid and went to see Mr Ramsden. Mr Ramsden found that Miss Olt was still not on the system and sent her home.

31. In the period 10 to 21 November, we see these message exchanges (130-132):

10 November - Miss Olt: *“Hi, hope you found out about the problem with my payment and the fact that I’m not in the system so I’m not allowed to work there....after I’ve been sent home Saturday because of this I’ve been told someone will contact with me yesterday. No one called me and when I call the shop no one is answering the phone. I don’t know what is happening but this is disrespectful and I am offended by your attitude and the way you manage things.”*

Mr Brown: *“Hey, I’ll be ringing you today as I’ve been on holiday, just got in so let me find out what’s happening and I’ll give you a ring” “Hey sorry for the lack of phone call, have been told by HR that you’ll hit our system tomorrow and then I can process the payment to get it through within 3 days from then. Appreciate its not been ideal and do apologise, I handed the detail over while I was on holiday so not sure why it hasn’t been chased up.”*

13 November - Mr Brown: *"Hey. Sarah mentioned you had some concerns around contract and pay, in terms of pay it should be coming through in the next 2 days, had an email confirmation come through to me. I've put the 16 hour contract in so once hrss have worked then we'll be able to request a copy for yourself."*

21 November – Mr Brown: *"A0o00a8 – username*

A12345 – password

Walmartone log in for yourself!"

Miss Olt: *"Thanks – (smiley face)"*

32. Having been provided with a Walmartone log in and password, all should have been well. However, it seems that Miss Olt was never able to use these to log in. It is not clear what steps Miss Olt took to address this between 21 November and 12 December, but she reports anxiety as, from her perspective, she was struggling with money and documents to support her application for student finance (WS 19).
33. Sometime in or around November 2020 Miss Olt sprained her ankle and was temporarily transferred to work on the checkouts. We understand that the checkouts were not under Mr Brown's management. Miss Olt moved back to Mr Brown's department after a short while (Ramsden WS 12).
34. On 8 December 2020 Miss Olt received a notice relating to her unpaid fees from Falmouth University (139). Miss Olt obviously shared her problem with a work colleague on 12 December 2020. As a result, Miss Olt saw Mr Brown. Miss Olt no doubt explained the problem with the student loan to Mr Brown. Mr Brown looked on the Company's systems and found a template letter modifying terms and conditions. This he amended, printed off and gave to Miss Olt together with a copy of her shift rota (123). It seems that Mr Brown could not access Miss Olt's pay slips because there were still problems with Miss Olt's Walmartone account.
35. Miss Olt was unable to do shifts on 22 and 23 December 2020 as she felt unwell (141). Miss Olt took some holiday thereafter.
36. On 7 January 2021 Mr Ramsden sent Miss Olt a text (142). Mr Ramsden wrote that he had not seen Miss Olt for a while and wanted to make sure she was okay. Miss Olt replied that she had been on holiday and had just tested positive for Covid 19. Miss Olt felt very unwell. The exchanges included:

Miss Olt: *"The problems I had last year are still going on and I'm still in a lot of trouble because I still can't access my walmartone account and I'm missing important documents for my application for student finance. Honestly, I feel I'm losing my mind...."*

Mr Ramsden: *"Ok when your isolation period has ended come into store and I will see if we can get this sorted, if I cant help im sure Jamie will be able to, let's get you back on track (thumbs up emoji)"*

37. The documents Mr Brown had provided to Miss Olt on 8 December 2020 had clearly not satisfied the student finance requirements. On the same day Miss Olt had the above exchange with Mr Ramsden (7 January), Miss Olt sent a message to Mr Brown (144):

"Hi Jamie, happy new year. I received an email from student finance asking me to send them some more evidence and documents. I am begging you to make some pictures and send them to me asap. I think you've heard I have covid so I can't come to work to pick them up." "And I still can't access my walmartone account."

38. We have seen no reply from Mr Brown and he does not seem to have had any further dealings with Miss Olt. The management structure was changing. Mr Ramsden was taking over from Mr Brown. We know that Mr Brown was suspended around this time. (Ms Diment's evidence was that the suspension was for reasons unconnected with this case and did not involve any allegation of race or disability discrimination, bullying or failure to deal with a grievance or complaint.)
39. On 19 January 2021 Miss Olt received another email from student finance to the effect that more documentation was required to satisfy their requirements (145).
40. That day, 19 January, Miss Olt contacted Mr Terry Jones, her GMB shop steward. What followed is, we think, a good example of the miscommunication and misunderstanding that dogged events. Miss Olt was clearly under the impression that Mr Jones had arranged a meeting between Mr Brown, Mr Jones and Miss Olt for 21 January. The message exchanges at 146, however, suggest that Mr Jones thought he had simply arranged for Miss Olt to see Mr Ramsden.
41. In any event, Miss Olt went to the store on 21 January 2021 and found neither Mr Brown nor Mr Jones there. Miss Olt says she was shocked by this (WS 29). Miss Olt did, however, meet Mr Ramsden.

Mr Ramsden found an administration manager who knew how to get into the Company's system. Mr Ramsden was therefore able to print off a letter in the same format as Mr Brown had supplied to Miss Olt on 8 December 2020, but this time on Company letterhead. Miss Olt's payslips were also printed off. It seems that this package did satisfy the student finance requirements as, thereafter, Miss Olt did not ask for any further paperwork. During the meeting with Mr Ramsden, Miss Olt says she suffered a panic attack (WS 29). Miss Olt told Mr Ramsden that she could not work her shift that day and went home. Miss Olt then went on sick leave.

42. The same day, 21 January, Miss Olt sent an email to the Company's central HR team (147-148). This summarised Miss Olt's complaints about what had happened since she arrived at the Penryn store:

"I am writing you because I encountered some issues since I had my transfer from Brackmills to Asda Penryn store. (4667 store number)

I moved to Falmouth on the 10th of October and because I am a student I need my contract and my payslips to be able to apply for student finance but since I came here I am unable to access my walmartone account. Since my arrival (3 months and a half ago) I have the following problems:

- *No uniform*
- *No PPI equipment (I work outside and inside the shop and I am supposed to collect the clients shopping from the freezer) I am working with my own clothes and I work in bad weather conditions*
- *No log in (I currently work on others colleagues log in)*
- *No training on how to use the computer for home shopping area*
- *No locker*
- *No Walmart one access (I cant see my payslips or collect other informations I need for uni).*

The most urgent problem is that I need my new contract to be able to apply for student finance and that should help regarding my uni payments but I can't get my manager to do that. He told me the first month that he couldn't get hold on HR and that's why I haven't hit the system even though my

previous managers from Brackmills emailed me before coming here saying my transfer is done. I had covid and my manager hasn't called at all, I had to wait for 2 days for my shopping because I couldn't get a shopping slot. I'm currently living with 400£ a month because I have documents missing from my application for my maintenance loan. I would be happy to be able to discuss this issues with someone so please contact me as soon as possible. This situation is going on for to long and I feel mentally unstable, I am desperate and I don't know where to go for help."

43. That email evidently found its way to Ms Diment. If Ms Diment considered the point, she did not see it as a grievance but, instead, looked for practical solutions to address the issues. Ms Diment made enquiries of various people and noted the results down on a copy of the email (147). The uniform was on order. A freezer jacket, hand masks and gel were available. There had been an issue registering Miss Olt for Walmartone because of her transfer from distribution to retail. Miss Olt would not be able to access Walmartone from home unless she did so first from the store. Miss Olt would have been shown how to use the computer in the home shopping area by Jo (Joe?). A locker would be organised. Mr Ramsden had now provided the payslips and other information.
44. Ms Diment telephoned Miss Olt on 25 January 2021. Miss Diment's evidence about that call is in paragraphs 8-11 of her witness statement.
45. Afterwards, having consulted Mr Ramsden, Ms Diment sent Miss Olt a supportive email confirming some parts of their discussion (149). Amongst other things, an occupational health referral was agreed. Ms Diment apologised for the bad experience Miss Olt had had.
46. On 29 January 2021 Ms Diment, again having consulted Mr Ramsden, sent a supportive follow up email to Miss Olt (149).
47. Nothing much seems to have happened after Ms Diment's email of 29 January until the end of March. There was one exchange between Miss Olt and Mr Ramsden on 10 February about a fit note and Miss Olt accessing her Walmartone account (151).
48. On 23 March 2021 Miss Olt had a telephone assessment with PAM Wellbeing, the Company's occupational health advisors. Their report is at 152-154. It can be referred to for its full content. In short, Miss Olt had been signed off work and prescribed medication by her GP because of "stress at work". Miss Olt had "multiple personal stressors" including the death in the last six months of six members of

her family in Romania and her inability to travel to see her family because of the Covid 19 pandemic. Miss Olt had a severe level of anxiety and a moderate level of depression. Miss Olt was “*experiencing feelings of grief and loss, stress and low mood in relation to several personal factors, compounded by the alleged work stressor*”. Counselling sessions were being put in place. A supportive environment, off and in work, dialogue and check-ins with management and a work stress risk assessment were recommended.

49. Mr Ramsden would have seen the occupational health report, but Ms Diment did not. Miss Olt remained signed off sick and Mr Ramsden does not seem to have taken any action on the report.
50. Around a month later, on 21 April 2021, Miss Olt sent Mr Ramsden a message (293). Miss Olt wanted to return to work and understood that there would have to be a meeting first. Miss Olt wished her GMB representative to be present. Mr Ramsden replied immediately to arrange a meeting the next day, 22 April, with Mr Jones, Miss Olt and himself before the start of Miss Olt’s shift.
51. There is no note of the meeting on 22 April 2021, as such. Mr Jones made some notes (155-157). However, they were clearly not intended as a note of the meeting. We will return to them below.
52. There are some material differences between Miss Olt on the one hand and Ms Diment and Mr Ramsden on the other, about exactly what happened.
53. The meeting started with Miss Olt, Mr Jones and Mr Ramsden. Mr Ramsden may have been expecting a straightforward return to work meeting. However, Miss Olt soon made it clear that she was very unhappy about what had happened. Feeling in need of support, Mr Ramsden asked Ms Diment to join the meeting.
54. Ms Olt’s evidence is this (WS 37). Miss Olt says she said she did not want to work in the same department as Mr Brown. Miss Olt was told that this would only be possible if she obtained a note from her GP requiring that. Miss Diment told Miss Olt that she had to put these things behind her if she wanted to move forward and asked Miss Olt what her intentions were regarding Mr Brown. Miss Olt did not accept that she should put matters behind her as she believed she had been discriminated against and wanted to bring a grievance against Mr Brown. Miss Olt says that she was then left alone with Mr Jones to take her statement. The result was Mr Jones’ note.
55. We did not have the benefit of evidence from Mr Jones so quite what the purpose of his note was, we do not know. What we can say is

that, on a plain reading, it is not a grievance and there is no mention of discrimination. It records events and ends with "*what we can do to put it right*". The answer was training and a mentor buddy. There is no mention of Miss Olt being required to obtain a note from her GP. It seems that Mr Jones' note was not shown to either Mr Ramsden or Miss Diment at the time.

56. Mr Ramsden accepts that Miss Olt made it clear that she would not work with Mr Brown again. Mr Ramsden says that Miss Olt was told that Mr Brown was no longer working in the department, so she would not have to work with him when she returned. Mr Brown does not remember asking Miss Olt to obtain a note from her GP requiring that she move departments as a pre-requisite of doing so (WS 23). Mr Brown does not believe he would have said this, commenting "*We could have moved her to a different department fairly easily if she had requested this*".
57. Miss Diment's evidence is to the same effect as Mr Ramsden's but considerably more detailed (WS 25-34). Miss Diment reports that Miss Olt became emotional, was crying and raised her voice at Mr Ramsden and her.
58. We prefer Mr Ramsden's and Ms Diment's evidence about what was said at this meeting. In particular, we accept that Miss Olt was told that Mr Brown was moving away from the department and that Miss Olt was not asked to obtain a GP's note before she could move departments. The word "discrimination" was not used at this meeting. This ties in with what little we know of Mr Jones' involvement. We do not, however, rule out the possibility that Miss Olt had misunderstood the meeting on the subject of the requirement for a GP's note.
59. Miss Olt's new uniform was available for her at this meeting.
60. Mr Jones came to speak to Mr Ramsden and Ms Diment after the meeting. Both report that Mr Jones confirmed that everything had been covered, the issues had been resolved and no mention was made of a grievance.
61. The next day, 23 April, Miss Olt obtained a fit note from her GP (157). As we record, it may be that Miss Olt had understood that she was required to do this. This records that Miss Olt may be "*fit for work taking account of the following advice*". It continues "*a phased return to work*", "*amended duties*" and "*Alleges bullying at work with no resolution. Recommend employer engagement and situational review with amended duties to avoid distress*". This fit note was sent to Mr Ramsden on the day it was provided (158). Mr Ramsden freely confesses that he did not read it at the time (WS 28). Miss Diment did

not see it until the commencement of these proceedings. Her evidence was that, if she had done, she would have advised acting on it. That is certainly what is contemplated by the Company's "Reasonable Adjustments" policy (76-81).

62. Miss Olt remained on sick leave for the next three months or so.

63. However Mr Ramsden, Ms Diment and Mr Jones thought the meeting on 22 April had left things, it seems that Miss Olt expected further action. The Company has an Ethics unit. The Company's Statement of Ethics is at 82-92. Its objective is to "*create an honest, fair and objective workplace while operating in compliance with all laws and our policies.*" Conduct falling short of these standards is a disciplinary matter. Having heard nothing following the meeting on 22 April, Miss Olt made a report to Ethics on 7 May 2021. Ethics' summary of Miss Olt's report is at 161-162.

64. Miss Olt's complaint was described as one of "*unfair treatment*". It was a summary of Miss Olt's views of what had happened to her since her arrival at the Penryn store. Ethics noted that "*Andreea is still off work but her doctor has said she can return on light duty, which she would like to do, but getting no response or guidance from her manager or the Union.*" Ethics ended by saying that Miss Olt had become emotionally upset towards the end of the call and wanted someone to contact her. Ethics referred the report to Ms Diment (160).

65. We think Ms Diment must have asked Mr Ramsden to contact Miss Olt. Mr Ramsden made the call on 13 May 2021 and seems to have reported what happened to Ms Diment. Ms Diment's near contemporaneous record (although second hand) of what happened during Mr Ramsden's call to Miss Olt is at 167:

"Her manager carried out a welfare meeting by phone following her contact to Ethics and as part of the Attendance Management Policy. He was unable to have a reasonable conversation with her, as she fluttered between shouting, crying, reverting to the same complaints (that have been dealt with), made personal criticisms of him, made demands on what he should do for her, and ended by dropping the phone on him. By example of expectations Andreea explained that although the Manager is on leave he should still contact her. He hoped to offer her further support, to ascertain what issues she wished to raise and to agree a "schedule of contact" with her, but this he was unable to achieve in the call. The Manager has stated that he suffering anxiety to deal with Andreea due to her irrational responses,

expectations and personal attacks. The issues she raised are the same that have already been addressed.”

66. Miss Olt puts a different complexion on this call (WS 39). It is, however, broadly similar. Miss Olt says that this was the only call she received from Mr Ramsden whilst she was off sick. Mr Ramsden says he made at least one call, whilst accepting that calls ceased when he met resistance (WS 29-32). We prefer Miss Olt’s evidence on this point and think there was only one call. Certainly, Mr Ramsden did not comply with the Company’s policies on contact with employees during a period of sickness absence (96).
67. Miss Diment sent her views, about Miss Olt’s report to Ethics, to Ms Hannah Doidge in Ethics on 1 June (167-168). The upshot, in effect, was that Ethics handed the matter back to Ms Diment.
68. On 28 June PAM Wellbeing reported that Miss Olt remained unfit for work (177-178).
69. On 23 June and 5 July 2021 Miss Olt and Mr Ramsden exchanged messages (176). Miss Olt wanted to talk about “*issues*” and her “*situation.*” There were further exchanges on 6 and 15 July (179-180). Mr Ramsden seems to have understood that Miss Olt was complaining about “*Jamie*” (Mr Brown). However, when Mr Brown had consulted Ms Diment, Ms Diment said Miss Olt should contact Ethics for an update. Mr Ramsden commented “*I have a phone call with gavin later to find out the correct process to take in regards to the next steps in your employment with asda, as I have no idea what comes next.*” “Gavin” was the Deputy Operations Manager, second in charge of the Penryn store.
70. On 15 July 2021 Miss Olt contacted Mr Jones. The message exchange is at 184-185. It seems that Mr Jones did not want to engage as he had been told by Ethics that Miss Olt had complained about him.
71. Matters came to a head on 31 July 2021. Miss Olt had stopped supplying fit notes, presumably because her GP was no longer issuing them. The last had expired on 20 July 2021. Mr Ramsden sent a message to Miss Olt asking whether she had another fit note. The exchange included (190):

Miss Olt: “I was asking you informations about my situation but you never came back to me. For how long am i entitled to sick pay? How long will i be employed for, if my situation doesn’t change? This company hasn’t done anything for me since i arrived in Falmouth. I am disgusted and I feel I’ve

been mistreated. Maybe you had other stuff to do besides managing your team but this is not my problem. I won't come back to work there, not in this kind of environment.

Have you had the chance to speak to Gavin?"

Mr Ramsden: *"All I have had from him and Claire is to follow the attendance policy I will look into this now."*

Miss Olt: *"You can tell him I am forced to find another job. I will not tolerate this anymore. I am destroying my mental health, and nobody in this company gives a fly about it."*

72. Although Miss Olt does not say so in her statement (but see her resignation letter at 203), it appears that she thought the exchange with Mr Ramsden on 31 July meant she had left the Company's employment. If so, Miss Olt is mistaken. There is nothing that amounts to a resignation. (We note that Miss Olt answered "Yes" to the question *"Is your employment continuing?"* in her claim form lodged on 28 September 2021.)
73. For reasons that are not clear to us, the next contact between Mr Ramsden and Miss Olt was over five months later, on 13 January 2022. Mr Ramsden's evidence is that he was waiting for Miss Olt's counselling sessions to finish (WS 36). However, the lack of contact is particularly surprising because, having consulted Ms Helen Coley (Regional Organiser – GMB Wales and South West) Miss Olt had entered ACAS conciliation on 6 August 2021, the Early Conciliation Certificate had been issued on 2 September 2021, Miss Olt lodged her claim with the employment tribunals on 28 September 2021 and the Company had entered a response on 22 December 2021. In any event, it appears that none of this had filtered down to Mr Ramsden or Ms Diment.
74. On 11 October 2021 PAM Wellbeing reported they had discharged Miss Olt, who had not attended all the booked counselling sessions (196).
75. On 13 January 2022 Mr Ramsden sent a message to Miss Olt asking for contact details (197). By letter dated 24 January 2022 Mr Ramsden invited Miss Olt to a health and wellbeing meeting (198).
76. The meeting took place on 27 January 2022. There is a broken transcript, best seen at 219-243. Present were Miss Olt accompanied by Mr Earl-Davies, Mr Ramsden and Ms Diment. Mr Ramsden and Ms Diment made efforts to explore Miss Olt returning to work, but they were in vain. In essence, Miss Olt had unanswered questions about her treatment by the Company since her arrival in Falmouth

and her sights were set on leaving. It is clear from the transcript (supplemented by evidence at the hearing before us) that Miss Olt knew about a three month primary time limit for bringing claims in the employment tribunals. Further, Miss Olt gave Mr Ramsden and Ms Diment an explanation of the concept of “*constructive unfair dismissal*” founded on the “*Duty of mutual respect and confidence*”. At one point Ms Diment asked Miss Olt if she could read English. Miss Olt takes exception to this. However, we are satisfied from both the transcript and the evidence we heard that Ms Diment was only considering the adequacy of notices she posted in store in English and no other language (Diment WS 48). This was an innocuous exchange.

77. Miss Olt resigned with immediate effect in an email on 31 January 2022 (203).

78. Having set out our material findings on the chronology of events, we now summarise our findings on the seven allegations Miss Olt makes in support of her claim of race discrimination.

79. The Company failed to provide Miss Olt with a uniform.

80. Miss Olt needed a new uniform because the uniform she was required to wear in store was different from the uniform she had brought with her from the Northampton Distribution Centre. It was ordered but was not available until the meeting that took place between Miss Olt and others on 22 April 2021. It, therefore, took over six months to arrive. It seems that an order was put in a considerable time before that but, apparently, the Covid 19 pandemic and the increased demand for uniforms for new recruits was disrupting the supply chain (see Ramsden WS 6 and Diment WS 13). Mr Brown does not remember Miss Olt raising the issue of uniform with him, although he was aware that Miss Olt was using her old uniform (WS 13 and 14).

81. The Company failed to provide Miss Olt with a locker at the Falmouth store.

82. The Company’s evidence is that a locker is not provided for all staff. However, if Miss Olt had asked for one, it would have been made available (see Brown WS 15). In any event, the Company says, a locker was available no later than 22 April 2021. This is one of several issues that was never physically resolved in the sense that Miss Olt never had a locker. However, this ceased to be relevant after Miss Olt left the store on 21 January 2021 because she did not return to work thereafter. Neither Mr Brown nor Mr Ramsden remembers Miss Olt raising the issue of a locker (Brown WS 13, Ramsden WS 8).

83. The Company failed to provide Miss Olt with a written contract of employment.
84. When Miss Olt first started to work for the Company she was issued with a comprehensive statement of terms and conditions of employment (111-118). It appears that these were not modified in writing to reflect Miss Olt's new duties at Penryn until Mr Brown provided the letter dated 22 December 2020 (123). That letter confirmed Miss Olt's hours as a "*Permanent Colleague*" and confirmed that all other terms and conditions remained as per Miss Olt's existing contract of employment. The provision of revised terms and conditions is not, however, what lies at the heart of this issue. Rather, Miss Olt needed something from the Company reflecting her employment status so that she could progress her application for student financial support for her degree. Mr Brown's effort to supply this in the form of the letter seems to have failed because it was not on Company letterhead. Mr Ramsden provided Miss Olt with a letter from the same template on 21 January 2021 together with payslips and that seems to have solved the problem. Miss Diment's evidence was that contractual paperwork should have been sent direct from HR central services to Miss Olt (WS15).
85. The Company failed to provide Miss Olt with access to her payslips because she was unable to access her online account.
86. The Company operates a system called Walmartone. Employees are given access to this through a username and password so that they can view payslips amongst other documents. On moving to the new post at Penryn, Miss Olt's existing log in details ceased to work. Because Miss Olt was changing from warehouse to retail operations, there seems to have been an extra level of complication in making the change, which caused significant delay (see Brown WS 6). Mr Brown attributes the delay to the length of time it took HR central services to process it. Mr Brown provided Miss Olt with a username and password on 21 November 2020 (132). The Company's evidence is that this worked because they tried it. Notwithstanding, it seems that Miss Olt was never able to make it work. It is possible this was because Miss Olt never made an initial login in store. As with the issue of the locker, this ceased to have much relevance after 21 January 2021 because Miss Olt was not at work. It did, however, cause some issues after 21 January when Miss Olt wanted to reconcile the sick pay coming into her bank account with payslips.
87. The Company failed to provide Miss Olt with a code for the employee entrance.

88. Mr Brown's evidence was that this should have been done at Miss Olt's induction with her work colleague, Chloe, on 29 October 2020. It seems it was not. This was another issue that ceased to have relevance after 21 January 2021 because Miss Olt was not at work. Mr Brown does not remember Miss Olt raising the issue of a code for the employee entrance with him (WS 13). Mr Brown says that, if she had, he would have been able to provide one straightaway (WS 16).
89. The Company failed to provide Miss Olt with a clocking in card.
90. Miss Olt needed this card so that her working hours could be recorded. The Company's case is that Miss Olt had this card no later than 12 November 2021. The premise for this is that no one except Miss Olt, with her clocking in card, could have created the punch record of Miss Olt's attendance at 134-137. That cannot be the case as some of the entries must have been made by someone other than Miss Olt. An example is the entries recording absence. There is some logic to the Company's position because Miss Olt started shifts at the Penryn store on 12 October 2020. There are no entries in the punch record before 12 November 2020 so, presumably, hours worked and paid for before 12 November were calculated outside the system, whereas those worked after were in the system. However, it seems to us that the clocking in card was never provided. This was another issue that ceased to have relevance after 21 January 2021 because Miss Olt was not at work.
91. The Company failed to provide Miss Olt with a login password for the computer system.
92. It transpires that this was a subset of the failure to provide access to Walmartone referred to in paragraphs 85 and 86 above. The issue was that, to do her job in the Falmouth store, Miss Olt needed to log in to the Company's systems to record, for example, the processing of totes full of goods. From the outset Miss Olt could only do this by using a colleague's card. Whilst this was usually possible, it caused problems if Miss Olt had to log in or log back in (because the battery in the scanner ran out) when no colleague was available. Perhaps indicative of aspects of the induction process that were lacking, Miss Olt never realised that this was a function of her inability to log into Walmartone. It appears that Miss Olt thought the two systems were different.
93. Miss Olt produced a disability impact statement in the course of these proceedings. This frank self assessment included this, which we believe played a part in the events we are concerned with (245):

“I am predisposed to chronically overthinking, worrying and overanalysing, which lead to what the therapists call “analysis paralysis”. Being paralysed by an inability to make a decision can get in the way of making simple and significant choices in life.”

APPLICABLE LAW

94. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his or her employer. For this right to arise there must be a dismissal.

95. Section 95(1) of the ERA, so far as it is relevant, provides:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if”....

“(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

96. The general principles relating to constructive unfair dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer’s actions (and not for some other reason, although the employer’s actions need not be the sole cause) or he or she risks waiving the breach and affirming the contract.

97. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal’s function is to look at the employer’s conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

98. The burden of proving a breach of contract sufficient to support a finding of constructive unfair dismissal is on the claimant.

99. Section 111 of the ERA, so far as it is relevant, provides as follows:

“Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”

Section 207B of the ERA is the provision that extends these time limits to facilitate conciliation through ACAS. The scheme of it is twofold. First, the period of conciliation is discounted when calculating time limits. Second, if a time limit would have expired in a period of conciliation, the time limit is extended for a month beyond the end of conciliation.

100. Section 4 of the EA, so far as it is relevant, provides:

“4 The protected characteristics

The following characteristics are protected characteristics-”

“disability,”

“race;”

101. Section 6 of the EA, so far as it is relevant, provides:

“6 Disability

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

102. Section 9 of the EA, so far as it is relevant, provides:

“9 Race

(1) *Race includes-*”

“(c) *ethnic or national origins.*”

103. Section 13 of the EA, so far as it is relevant, provides:

“13 Direct discrimination

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*”

104. Sections 20 and 21 of the EA, so far as they are relevant, provide as follows:

“20 Duty to make adjustments

(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

(2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with others who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”*

“21 Failure to comply with duty

(1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”*

105. Paragraph 20(1) of Schedule 8 to the EA, so far as it is relevant, provides as follows:

“20 Lack of knowledge of disability, etc

(1) *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-”*

“(b) *in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”*

106. Section 23 of the EA, so far as it is relevant, provides as follows:

“23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of sections 13, 14, or 19 there must be no material differences between the circumstances relating to each case.”

107. Section 39 of the EA, so far as it is relevant, provides as follows:

“39 Employees and applicants

“(2) An employer (A) must not discriminate against an employee of A’s (B)-

(a) as to B’s terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

“(5) A duty to make reasonable adjustments applies to an employer.”

108. Section 123 of the EA, so far as it is relevant, provides:

“123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks is just and equitable.”

“(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

Section 140B of the EA is the provision that extends these time limits to facilitate conciliation through ACAS. The scheme of it is as for unfair dismissal.

109. A recent Court of Appeal decision (Adedeji v University Hospital Birmingham NHS Trust [2021] EWCA Civ 23) cautions against using the traditional approach of going through the factors in section 33 of the Limitation Act 1980 when applying the “just and equitable” test. In his leading Judgment, Lord Justice Underhill made it clear that the focus in applying the test, should be on the factors behind the delay. Further, Lord Justice Underhill pointed out that the employment tribunals have a wide discretion in this area.

110. There is no presumption that a tribunal should exercise its discretion to extend time. Time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant’s failure.

111. Section 136 of the EA, so far as it is relevant, provides:

“136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

112. The Tribunal was referred to Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, Trevelyan (Birmingham) Ltd v Norton 1991 ICR 488, Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606, Morrow v Safeway Stores Plc [2002] IRLR 77, Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, Madarassy v Nomura International plc [2007] IRLR 246, Perth and Kinross Council v Townsley EATS 0010/10, B and C v A [2010] IRLR 400, Fereday v South Staffordshire NHS Primary Care Trust EAT 0513/10, Da’Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, Mari v Reuters Ltd EAT 0539/13 and Wright v North Ayrshire Council [2014] ICR 77.

CONCLUSIONS

113. **The section 13 EA claims of direct race discrimination**

114. Time points

115. In respect of these claims, Miss Olt relies on the seven allegations listed in paragraph 2 and individually explored at paragraphs 79-92 above.
116. The claim form was presented on 28 September 2021. ACAS conciliation was commenced on 6 August 2021 and the Early Conciliation Certificate was issued on 2 September 2021. In short, the Company's point is that any claim in respect of an act before 7 May 2021 is out of time.
117. Miss Olt was provided with her uniform on 22 April 2021.
118. A locker was available to Miss Olt from the commencement of her employment at the Penryn store on 12 October 2020. The Company did not refuse to make a locker available to Miss Olt. When the matter was brought to Miss Diment's attention, the Company was prepared to organise this no later than 25 January 2021 (see 147-149).
119. Mr Ramsden provided Miss Olt with the employment papers she required for student finance on 21 January 2021. This included the payslips.
120. Mr Brown provided log in details for Walmartone on 12 November 2020.
121. Miss Olt did not include the lack of a code for the employee entrance in the list of problems she sent to HR central on 21 January 2021. The evidence is that, had Miss Olt asked for it, it would have been provided almost immediately by Mr Brown. Applying section 123(4)(b) EA, the Company might reasonably have been expected to do this at Miss Olt's induction on 29 October 2020.
122. It seems that Miss Olt was never provided with a clocking in card. Again, however, applying section 123(4)(b) EA, the Company might reasonably have been expected to do this at Miss Olt's induction on 29 October 2020.
123. All these acts, for the purposes of the EA, occurred well before the cut off date of 7 May 2021. The claims, therefore, were not made within three months (plus any early conciliation extension) of the act or omission to which they relate.
124. First, we turn to any possible "conduct extending over a period" exception. In short this means that time will be extended in respect of earlier otherwise out of time acts (including failures to act) if those acts are part of conduct extending over a period ending with an act or

acts that are in time. It is, however, established that the in time act or acts relied on must, itself or themselves, be a discriminatory act or acts. In this case, there are no such acts. It follows that this exception has no application here.

125. Second, we turn to consider an extension of time in respect of these out of time claims on the “just and equitable ground”. The issue is, did Miss Olt bring her proceedings in respect of those alleged acts of discrimination after the end of such other period as the Tribunal thinks just and equitable? The latest date for any act or omission we have identified is 22 April 2021 (the provision of a uniform).

126. The Tribunal sees no particular general prejudice factor favouring either party.

127. The reason for the delay given by Miss Olt is simple. Miss Olt was unfamiliar with her rights in this respect. Notwithstanding, Miss Olt had engaged with her trade union no later than 19 January 2021 (see 146) and was capable of asking about her rights as, indeed, she did before entering into conciliation on 6 August 2021. We see no circumstances which would make it just and equitable to extend time and do not do so.

128. The Tribunal’s conclusion is that these claims are out of time. Those claims are, therefore dismissed.

129. The merits of the claims

130. Notwithstanding, if we were to be wrong about the claims being out of time, we have heard the evidence and it is proportionate to consider whether they would have succeeded if they had not been out of time. It is also the case that an out of time act of discrimination may have a bearing on the constructive unfair dismissal claim. Our conclusions on these claims, set out below, are to be read on the basis that this is the decision we would have made, had the claims been in time.

131. The claims are brought as claims of direct discrimination, the protected characteristic being race. The test is, are there facts from which we could decide, in the absence of any other explanation, that any or all the acts complained of was or were less favourable treatment because of Miss Olt’s race (in this case - Romanian national origins)?

132. We are required to use a comparator. Miss Olt offers two, Jack and Joe. Those comparators do not, however, satisfy the requirements of section 23 EA. The material difference between them and Miss Olt is that the two people concerned did not transfer in (if they transferred in

at all) from a distribution centre. This is fundamental to the case because the evidence is that it gave rise to the problem at the heart of Miss Olt's claims. That was, the failure to have her transfer processed through the Company's systems in a timely way.

133. Miss Olt can rely on a hypothetical comparator. This would be a person in circumstances not materially different from her own but not of Romanian national origins. When we apply the test to this comparator, we conclude that the comparator would have been treated just as Miss Olt was treated. The acts and omissions complained of were explicable in context and there is nothing to suggest that they happened because of Miss Olt's national origins. We asked Miss Olt if her complaint of race discrimination lay only against Mr Brown or included Mr Ramsden and/or Miss Diment. Miss Olt was unsure. Nothing overt had ever been said that Miss Olt complained of. Rather, Miss Olt had been left asking herself why the things she complained about had occurred. When the individual acts and omissions are looked at in context, we do not see the *Madarassy* "something more". We think the acts and omissions are self explanatory and untainted by discrimination from any of Mr Brown, Mr Ramsden or Ms Diment. These claims, had they not been out of time, would have failed.

134. **The section 20 and 21 claims of a failure to make reasonable adjustments.**

135. Time points

136. These claims were allowed to proceed by Employment Judge Fowell by way of amendment of the claim on 17 October 2022.

137. Where an application to amend to include a new claim is made in this way, the claim, if allowed to proceed, is treated as having been made on the day of the application, in this case 22 July 2022. Time limits are calculated using that date. These particular claims cannot post date Miss Olt's resignation from the Company on 31 January 2022 and are, in any event, outside the primary three month time limit.

138. On a full analysis, the claims are more out of time than that. The failure complained of is, in essence, a failure to move Miss Olt away from the department she was working in. On the evidence, that was not a difficult thing to do and it could have been done quickly. In November 2020 there had been no difficulty in moving Miss Olt to the checkouts at short notice (see paragraph 33 above). Applying section 123(4)(b) of the EA, the period in which the Company might reasonably be expected to make the adjustment would have been

short. If a duty arose, it arose when Mr Ramsden received the fit note on 23 April 2021. The Company might reasonably have been expected to make the adjustment within, say, two weeks. The failure to make the adjustment took place no later than 7 May 2021.

139. Either way, the claims were substantially out of time.
140. There can be no argument about “conduct extending over a period” on either analysis. The time for making the adjustment was fixed as either 7 May 2021 or 31 January 2022.
141. We turn to consider an extension of time in respect of these out of time claims on the “just and equitable ground”. The issue is, did Miss Olt bring her proceedings in respect of those alleged acts of discrimination after the end of such other period as the Tribunal thinks just and equitable?
142. As with the race discrimination claims, the Tribunal sees no particular general prejudice factor favouring either party.
143. The reason for the delay given by Miss Olt is the same reason Miss Olt gave for not bringing the race discrimination claims sooner. Miss Olt was unfamiliar with her rights in this respect. Notwithstanding, Miss Olt had engaged with her trade union no later than 19 January 2021 (see 146) and was capable of asking about her rights as, indeed, she did before entering into conciliation on 6 August 2021. Whether time ran from 7 May 2021 or 31 January 2022, Miss Olt had opportunity to find out what her rights were. At the meeting on 27 January 2022, it was clear that Miss Olt understood that there was a general three month time limit. Further, we know that it was Miss Olt who identified the claim of a failure to make reasonable adjustments because Employment Judge Roper recorded this in his Case Management Orders (see 42). We see no circumstances which would make it just and equitable to extend time and do not do so.
144. The Tribunal’s conclusion is that these claims are out of time. Those claims are, therefore dismissed.
145. The merits of the claims
146. Notwithstanding, if we were to be wrong about the claims being out of time, we have heard the evidence and it is proportionate to consider whether they would have succeeded if they had not been out of time. It is also the case that an out of time act of discrimination may have a bearing on the unfair constructive dismissal claim. Our conclusions on these claims, set out below, are to be read on the basis that this is the decision we would have made, had the claim been in time.

147. The PCP of the Company, recorded as being relied on by Miss Olt, is requiring employees to remain in the same department without transferring them. In truth, that is not what Miss Olt was concerned about. What Miss Olt was concerned about was being required to remain in a department with Mr Brown as manager. That cannot be a PCP. However, for the sake of argument we will assume we are wrong about that.

148. The next step of the test would be to determine whether the PCP put Miss Olt at a substantial disadvantage compared to someone without her disability. The substantial disadvantage referred to in the Case Management Orders of 22 July 2022 is “*that remaining in that department with her manager Mr Jamie Brown aggravated her anxiety*”. The difficulty with that is immediately apparent on the facts. By the time any duty to make adjustments arose (on 23 April 2021 when Miss Olt’s GP’s note raised adjustments as an issue) Mr Brown had been replaced by Mr Ramsden as Miss Olt’s manager. Therefore, allowing Miss Olt to change departments would have achieved nothing. No duty to take such steps as it was reasonable to have to have taken to avoid the disadvantage arose because there was no such disadvantage. This claim would have failed on its merits.

149. **The constructive unfair dismissal claim**

150. Time points

151. As with the claims of a failure to make reasonable adjustments, this claim was allowed to proceed by Employment Judge Fowell on 17 October 2022.

152. The time limit context for this claim, however, is different from that applicable to the claims of a failure to make reasonable adjustments. Whilst the circumstances existed for Miss Olt to have claimed a failure to make reasonable adjustments at the time she lodged her claim on 28 September 2021, that is not so for the claim of constructive unfair dismissal. Whatever Miss Olt may or may not have believed on 28 September 2021 (the position is unclear on that), she remained in the Company’s employment on that date.

153. Any constructive unfair dismissal claim can only have come into being as of the date of Miss Olt’s resignation, 31 January 2022. Miss Olt lodged no new claim with the employment tribunals and it was not until the case came before Employment Judge Roper on 22 July 2022 that Miss Olt applied to include a claim of unfair constructive dismissal. By that time, the claim was well outside the three month time limit.

154. The question for us therefore is, was it reasonably practicable for the claim to have been made to the tribunals within the time limit and, if not, was it made within a reasonable period?
155. The reason for the delay given by Miss Olt is the same reason Miss Olt gave for not bringing the discrimination claims sooner. Miss Olt was unfamiliar with her rights in this respect.
156. As far as ignorance of rights is concerned, the question we must ask is whether Miss Olt ought to have known of her rights. Miss Olt had engaged with her trade union no later than 19 January 2021 (see 146) and was capable of asking about her rights as, indeed, she did before entering into conciliation on 6 August 2021. Miss Olt had opportunity to find out what her rights were. At the meeting on 27 January 2022 it was clear that Miss Olt understood that there was a general three month time limit and Miss Olt also quoted ACAS guidance on constructive unfair dismissal. Further, we know that it was Miss Olt who identified the claim of constructive unfair dismissal because Employment Judge Roper recorded this in his Case Management Orders (see 42). The only conclusion open to us is that Miss Olt either did or ought to have known of her rights.
157. It was, therefore, reasonably practicable for the claim to be made to the employment tribunals within the time limit. It was not brought in time and must be dismissed because the employment tribunals have no jurisdiction to hear it.
158. The merits of the claim
159. Notwithstanding, if we were to be wrong about the claim being out of time, we have heard the evidence and it is proportionate to consider whether it would have succeeded if it had not been out of time. Our conclusions on this claim, set out below, are to be read on the basis that this is the decision we would have made, had the claim been in time.
160. It is clear to us that Miss Olt resigned for two broad reasons. First, because of the treatment she had received from the date she reported for her first shift at the Penryn store on 12 October 2020 until the meeting on 21 January 2021. Second, because, as Miss Olt saw it, the Company refused to engage with her grievance about Mr Brown after the meeting on 21 January 2021 until her resignation on 31 January 2022 and did not engage with her to explore a return to work, particularly with the adjustments put forward by her GP in a fit note dated 23 April 2021.

161. We must consider whether the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Company going to the root of the contract of employment. In other words, was there a fundamental breach of contract entitling Miss Olt to resign and treat herself as constructively dismissed?
162. We are concerned here with the issues set out in paragraph 6 above, many of which were relevant for the discrimination claims. The seven issues still loomed large in Miss Olt's mind at the time she resigned on 31 January 2022. However, in reality, they were either resolved or stale by then. By themselves and in context we do not think any or all the seven issues amounted to a fundamental breach of contract.
163. Miss Olt, however, raised three further issues and we will look briefly at each in turn.
164. The first was Mr Ramsden only making one contact with Miss Olt during her sickness absence. By this Miss Olt means that Mr Ramsden only made one call for a "wellbeing meeting" or "catch up". As a fact we have found that there was only one such call. We understand that it might have been difficult for Mr Ramsden to call Miss Olt, who often made such contact uncomfortable. However, it was part of Mr Ramsden's job to make such calls and he failed to do so. This was a contributory factor in the almost complete lack of opportunity that Miss Olt had between 22 April 2021 and 27 January 2022 to explore ways of bringing her back into the Company's employment.
165. The second issue was a subset of the first. The Company failed to consider the adjustments set out in the fit note dated 23 April 2022. Although we have found no discrimination in this, the fact remains that the Company never considered the adjustments because Mr Ramsden did not read that part of the fit note. We appreciate that Mr Ramsden was newly appointed, possibly at a higher level of management and that the store was in "chaos" because of the demands of the Covid 19 pandemic. Nevertheless, this was a serious omission by Mr Ramsden, who was clearly inadequately trained. Had the Company entered discussion with Miss Olt on the subject as it should have done, there is some chance (although we accept in the circumstances, not a great chance) that events would have taken a different turn.
166. The third issue was, perhaps, the most important to Miss Olt. From Miss Olt's perspective the Company had failed to properly process her grievance against Mr Brown. This was partly not of the

Company's making. Probably through a failure to communicate properly, Miss Olt did not lodge anything that looked like a formal grievance before she approached Ethics in May 2021. Having said that we have considerable doubts about the way Ms Diment and Mr Ramsden chose to see the issues Miss Olt raised at the meeting on 22 April 2021. We accept that we are looking at this with the benefit of hindsight, but it seems to us there was enough to alert a reasonable bystander (and certainly a manager or HR officer) to the real issue. It was Miss Olt's concern about why these things had happened to her. Instead of recognising that, Mr Ramsden and Ms Diment saw their task as just putting the individual failings right.

167. We would have found these three issues, taken together, as amounting to a fundamental breach of the implied term of trust and confidence in the contract of employment between Miss Olt and the Company. That would have entitled Miss Olt to resign and treat herself as constructively dismissed.
168. We do not think that Miss Olt affirmed the contract thereby waiving any breach. Although Miss Olt drew sick pay, she did not let the issue rest but approached Ethics. Subsequently, although the position is not clear, Miss Olt seems to have thought she resigned in July 2021.
169. It would have followed that Miss Olt's claim of constructive unfair dismissal would have succeeded. As far as remedy would have been concerned, in addition to a basic award and a small sum for loss of statutory rights, Miss Olt would have been awarded no more than six months' salary at her two shift rate.

Employment Judge A Matthews
Date: 10 April 2023

Judgment & Reasons sent to the parties: 13 April 2023

FOR THE TRIBUNAL OFFICE